IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2017] NZERA Auckland 158
3009292

	BETWEEN	JANELLE CALDER Applicant
	A N D	HOME DIRECT LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Anthony Drake and Emily Strom, Counsel for Applicant Ashley Sharp, Counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	13 April 2017 from Applicant 27 April 2017 from Respondent
Date of Determination:	29 May 2017

DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY

A. The application to remove this case in its entirety, under s.178 of the Employment Relations Act 2000, for the Employment Court to hear and determine without first being investigated by the Authority, is declined.

Employment relationship problem

[1] Janelle Calder was employed by Home Direct Limited (Home Direct or the company) as its General Manager, Retail.

[2] Ms Calder claims that on 5 December 2016 she was given notice of termination of her employment by Home Direct on the grounds of redundancy, and

that this was followed by a second notification of termination on 17 February 2017, again on the grounds of redundancy.

[3] Ms Calder brings two claims of unjustifiable disadvantage. The first claim concerns an unfair and inadequate consultation process in contravention of s 4(1A)(c)(i) and (ii) of the Employment Relations Act 2000 (the Act). The second claim is that Ms Calder was unjustifiably disadvantaged through Home Direct's breach of its good faith obligations under s 4(1)(a) of the Act.

[4] Ms Calder also claims that she was unjustifiably dismissed from her employment by Home Direct. The dismissal is claimed to be both substantively and procedurally unfair and was not what a fair and reasonable employer could have done in all the circumstances.

[5] Home Direct says that it did not unjustifiably dismiss Ms Calder, and that her employment was not terminated at any stage prior to 17 February 2017. It says that any breaches of good faith in this matter were committed by Ms Calder who was uncommunicative and unresponsive in the consultation process and failed to request further information. Home Direct says that Ms Calder embarked on a deliberate and conscious course of conduct to refuse to engage with the company in the consultation process.

[6] At the first case management conference, Ms Calder's representative indicated that an application to remove this proceeding to the Employment Court (the Court) was to be made. The parties agreed that the removal issue could be heard on the papers and a timetable was set for the filing of the application and memorandum by both parties. Removal to the Court is opposed by Home Direct.

Events in December 2016

[7] Importantly for the purposes of the removal application there is a dispute between the parties as to what was said at the 5 December 2016 meeting. From the statement of problem Ms Calder says that she was given notice of dismissal on the ground of redundancy. Home Direct's statement in reply states that that meeting was set up to receive feedback and proposals from Ms Calder, but that none were received. Then the company's representative Michael Wright indicated that he intended to

disestablish Ms Calder's position and that an extended notice period was to commence on 12 December 2016.

[8] The following day Ms Calder raised concerns in writing about a lack of proper process and the prospect of pursuing a personal grievance claim. Mr Wright wrote to her saying that there appeared to have been a disconnect in their communications. He said that he thought that Ms Calder had no feedback to make so he went ahead with the disestablishment. Mr Wright recused himself from the process and asked a member of the advisory board, John Roberts, to conduct the consultation process with Ms Calder.

[9] Mr Roberts then wrote to Ms Calder with a view to start a consultation process. This ultimately culminated in Home Direct making Ms Calder redundant in February 2017.

Removal to the Court

[10] The application to remove relies on s 178 of the Act which allows the Authority to order removal of any matter, or any part of it, to the Court to hear and determine without the Authority investigating it. Ms Calder seeks to have the whole of her claim removed.

[11] The grounds for removal are listed in 178(2) of the Act. The Authority needs only be satisfied that one of those grounds exists in order to grant the application for removal which Ms Calder seeks.

[12] Ms Calder's application is based on the matter involving an important question of law[1], being of such a nature and of such urgency that it is in the public interest to immediately remove it[2] and that in all the circumstances the Court should determine it[3]. The emphasis in the submissions in support was on the first ground.

[13] The first question to be considered is whether I am satisfied that one or more of the statutory tests in s 178(2) of the Act are met. If one or more of the tests are met I then undertake an assessment of whether I should exercise my residual discretion not

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1 S 178(2)(a) of the Act
2 S 178(2)(b) of the Act
3 S 178(2)(d) of the Act

to remove on the basis of there being sufficient relevant factors against removal[4]. The residual discretion to decline removal, even where one of the criteria under s 178 is met, was reaffirmed by the Court in *Hall v Dionex Pty Ltd*[5].

Important question of law

[14] Ms Calder relies on the following questions of law as being important:

(i) Can this employer withdraw notice of termination without the agreement of the employee to patch-up a flawed dismissal?

(ii) Was it too late to 'start again' a process intended to adversely alter the employment of an employee once notice of termination had been given?

(iii) To what extent is an employee required to allow an employer to correct its mistakes?

(iv) Does the obligation of good faith extend to a requirement that an employee must participate in a repeat process where a decision has already been taken and communicated to the employee?

[15] Home Direct's position is that the principal question upon which the matter revolves is whether an employer can withdraw a notice of termination without the agreement of an employee, to patch up a flawed dismissal. I accept that approach. The second, third and fourth questions appear inextricably linked to the first question.

[16] In terms of what is an important question of law, guidance was provided by the Court in *Hanlon v. International Foundation (NZ) Inc*[6]. There Chief Judge Goddard noted that it is not enough for the question to be important to the outcome of the case. Further, a question of law would be important if it is decisive of the case or some important aspect of it, or strongly influential in bringing about a decision or a material part of it[7].

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4 *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [29]
5 [2013] NZEmpC 27 at [26]
6 [1995] 1 ERNZ 1 at p7
7 Ibid

[17] I accept that the principal question raised by Ms Calder is important to the decision in her case, although there are also factual matters to be decided. It is submitted on her behalf that the parameters and scope of the important questions of law have not been considered in depth by the Court and this is a novel question.

[18] Submissions on Ms Calder's behalf identified the most relevant authority to the present matter as being *Rankin v Attorney-General* [8]. There the Court confirmed that an employer can remedy procedural flaws through a subsequent reconsideration of the decision, which in that case was dismissal. However, there Ms Rankin had requested that her employer reconsider the decision. It seems agreed here that that was not the case with Ms Calder. In *Rankin* the Court found that a breach of contract could be put right, before it causes damage.

[19] Submissions for Home Direct regard the principal question as having already been determined by the Court and therefore there being no basis for uplifting this case to the Court. Reliance is placed on *Pacifica Fishing (Christchurch) Ltd v Buckingham* [9] and *Malaysia Airline Systems BDH (New Zealand) Ltd v Malone* [10]. It is acknowledged by the company that the comments of relevance to the current issue in the *Pacifica Fishing* case were obiter but that the same approach was taken in *Malaysia Airline Systems*.

[20] I consider that sufficient guidance is available from these decisions, as well as from the Court's decision in *Brown v New Zealand Tourism Board* [11], to mean that the principal question of law raised by Ms Calder does not warrant removal. Although two of these decisions were decided under the previous employment legislation, the *Malaysia Airline Systems* case was decided under the Employment Relations Act 2000. I am not satisfied that the test in s 178(2)(a) of the Act is met.

Public Interest

[21] Ms Calder claims that it is in the public interest for there to be clear guidance on the extent to which an employer is permitted to repeat a process in order to achieve

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8 [2001] ERNZ 476
9 [1999] 2 ERNZ 621
10 [2003] 1 ERNZ 494
11 [2000] 2 ERNZ 42

the same outcome. Also, to what extent an employee is required to participate in a repeated process.

[22] Whilst I accept that the outcome of this case could be of interest to a wider group of the public, there is already guidance outlined in the decisions referred to above under the important question of law heading. In addition, I do not consider that there is urgency as is required by s 178 (2)(b) of the Act. This ground is therefore not established.

All the circumstances

[23] For Ms Calder, the importance of allowing finality in the work environment is stressed. Although finality is important I am not satisfied that this is sufficient of itself for s 178(2)(c) of the Act to be established.

Conclusion

[24] I am not satisfied that removal should be granted under s 178 of the Act and the application is declined.

Costs

[25] No costs were sought in connection with the removal application.

Nicola Craig
Member of the Employment Relations Authority